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Supreme Court of the United States.

October Term, 1932.

No. 228

George A. Ohl & Company,
Petitioner,

v.

The A. L. Smith Iron Works,
Respondent.

No. 229

Same v. Same.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit and Brief in Support Thereof.

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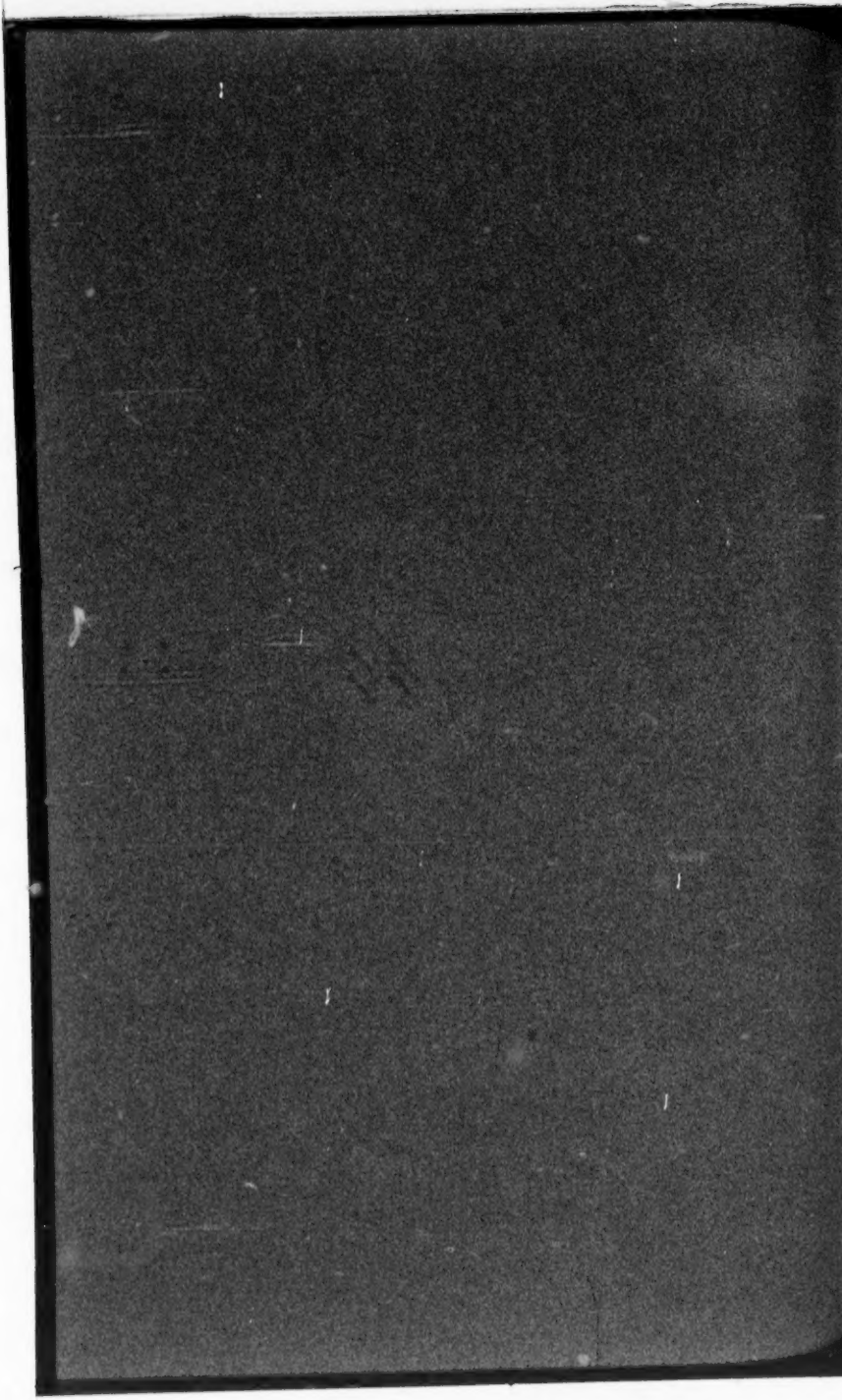

INDEX.

	Page
Petition for writs of certiorari	1
Certificate of James S. Allen, clerk	8
Brief in support of petition for writs of certiorari	13
A. Statement of case, questions raised and errors assigned	13
B. There was merit in the bills of exceptions warranting judicial review	14
C. Argument	16
I. The present decision is in conflict with the practice established by another Federal Circuit Court of Appeals, and introduces uncertainty into Federal procedure and practice	16
II. Liberalized Federal practice does away with such technicalities of procedure as were here applied	18
III. The mistake was amendable	22
IV. "Judgment term"	28
V. Appeal does not prevent relief	32
VI. A reactionary and unworthy decision	32

AUTHORITIES CITED IN BRIEF.

Barber Asphalt Co. v. Standard Co., 275 U.S. 372	14, 21, 32, 33
Bedford v. J. Henry Miller, Inc., 212 Fed. 368	23
Bills of Exceptions, Re, 37 F. (2d) 849	30, 31
Blitz v. Brown, 7 Wall. 693	26
Brown v. United States, 196 Fed. 351	25
Bryan v. Ker, 222 U.S. 107	24
Chateaugay Ore & Iron Co., Petitioner, 128 U.S. 544	30
Clarksburg Trust Co. v. Commercial Casualty Ins. Co., 40 F. (2d) 626	21
Cotter v. Alabama, G. & S. R. Co., 61 Fed. 747	24
Dalton v. Gunnison, 165 Fed. 873	30
Davis v. Patrick, 122 U.S. 138	30
Dredge v. Forsyth, 2 Black, 563	29
Exporters v. Butterworth-Judson Co., 258 U.S. 365	29, 31
Fairbanks v. Beard, 247 Mass. 8	21
Federal Life Insurance Co., Re, 248 Fed. 908	31
Franklin County v. Furry, 144 Fed. 663	31
Hume v. Bowie, 148 U.S. 245	29
Hunnicutt v. Peyton, 102 U.S. 333	30
Idaho & Oregon Land Co. v. Bradbury, 132 U.S. 512	26

Page

Jones v. Grover & Baker Sewing Machine Co., 131 U.S. Appx. cl. 29
Koewing v. Wilder, 126 Fed. 472 31
Krauss Brothers Lumber Co. v. Mellon, 276 U.S. 386 20
McDonald v. Nebraska, 101 Fed. 171 19, 24
Mark v. Stuart Howland Co., 226 Mass. 35 15
Matheson's Adm'rs v. Grant's Adm'r, 2 How. 263 23
Michigan Ins. Bank v. Eldred, 143 U.S. 293 25, 27, 29, 30
Miller v. Texas, 153 U.S. 535 24
Muller v. Ehlers, 91 U.S. 249 29
Mussina v. Cavazos, 6 Wall. 355 25
Norton v. Larney, 26 U.S. 511 23, 24, 32
Origet v. United States, 125 U.S. 240 25, 26
Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., 151 Fed. 466 30
Plymouth Cordage Co., In re, 135 Fed. 1000 25
Pomeroy's Lessee v. Bank of Indiana, 1 Wall. 592 24
Roberts v. Bennett, 135 Fed. 748 30
Scaife v. Western North Carolina Land Co., 87 Fed. 308 31
Schmid v. Standard Steel Car Co., 202 Fed. 1023 31
Southwest Metals Co. v. Gomez, 4 F. (2d) 215 31
Steen v. First National Bank, 298 Fed. 36 18
Taylor v. United States, 52 Sup. Ct. Rep. 466 30
Taylor Co. v. Anderson, 275 U.S. 431 23
Texas & Pacific Ry. Co. v. Kirk, 111 U.S. 486 24
United States v. Breitling, 20 How. 252 29
United States v. Turner, 50 Fed. 734 24
United States (Ex Rel. Kinney) v. U.S. Fidelity Co., 222 U.S. 283 28
Waldron v. Waldron, 156 U.S. 361 30
Walton v. United States, 9 Wheat. 651 29
Western Dredging & Imp. Co. v. Heldmaier, 116 Fed. 179 29, 31
Wight, In re, 134 U.S. 136 25

Act March 3, 1915, c. 90 19
Sales Act of Massachusetts, General Laws, c. 106, sec. 58 (1 a, b (2)) 15
St. Feb. 26, 1919, c. 48 19
U.S. Code, tit. 28, sec. 391 14, 19
U.S. Code, tit. 28, sec. 397 18
U.S. Code, tit. 28, sec. 398 18
U.S. Code, tit. 28, sec. 399 19
U.S. Code, tit. 28, sec. 777 14, 22

Supreme Court of the United States.

OCTOBER TERM, 1932.

No.

GEORGE A. OHL & COMPANY, PETITIONER,

v.

THE A. L. SMITH IRON WORKS, RESPONDENT.

No.

SAME *v.* SAME.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, George A. Ohl & Company, respectfully presents to this Court this its petition in each of the above cases for a writ of certiorari in each case addressed to the United States Circuit Court of Appeals for the First Circuit, commanding such Court and the clerk thereof to certify to this Court the record and proceedings of these cases in said Court, in each whereof your petitioner, a corporation of the State of New Jersey, was appellant and your respondent, The A. L. Smith Iron Works, a corporation of the Commonwealth of Massachusetts, was appellee, together with the opinion therein of said Circuit Court of Appeals for the review and determination of said causes by this Court.

These are two cross-actions tried together (R. 4), included in one record on appeal (R. I to III),* and decided by said Circuit Court in one opinion (R. 264).

The original controversy involved breach of a contract of conditional sale of a power press and accessories (R. 11, Ex. A) sold to the respondent who, after it had made payments aggregating $4963 (R. 215), claimed a breach of warranty (R. 32, Ex. EE). At the time of the trial (April and May, 1929, R. 4), three years after the sale (March, 1926, R. 11, Ex. A; R. 8, Specif. 1), the machine was still in use at the respondent's factory (R. 82, line 10). The jury reached the absurd verdicts that, although the respondent had accepted and had used the machine for years, there was a breach of warranty, and that in the petitioner's suit there could be no recovery of the purchase price balance (R. 5), and in the respondent's suit that the respondent should get back the $4963 he had already paid, plus $2500 damages (R. 234); so the verdicts resulted in the respondent retaining the petitioner's property without paying for it, and being awarded damages because the machine was not worth the contract price.

A very careful and exhaustive bill of exceptions† was prepared and later redrawn as a substitute bill, and filed in court with the assent of the defendant endorsed thereon for allowance, and seasonably presented to the trial judge (Honorable James A. Lowell). The trial judge, in counsels' presence, examined the bills and orally allowed them. Later the same day, not in counsels' presence (R. 290, 307, 312), he endorsed in writing at the end of each bill the following: "Allowed August 20, 1930 J. A. L.

D.J." (R. 219, 221, 236, 237).

*The printed record (R. I to 263) omits certain exhibits in evidence, largely photographs, blue-prints and diagrams, which by stipulation were submitted direct from the District Court to the Circuit Court of Appeals (R. 11, 219, 237) in the form of one bound volume of approved copies. That volume is submitted herein by the clerk of the Circuit Court of Appeals for the First Circuit.

†There were four bills of exceptions assented to and seasonably allowed in each case, one to the trial merits, and one to refusals of a new trial (R. 219, 221, 236, 237). As each involved and was disposed of on the same issue, we generally refer to them in the singular.

The Circuit Court of Appeals for the First Circuit felt bound by some precedents of this Court to hold that the district judge had not sufficiently authenticated his allowance of the bills by this endorsement, and because of this lack of a sufficient signature by the judge there was no bill of exceptions in the Court of Appeals. So the judgments below were affirmed (R. 269).

The present petition for certiorari squarely raises the issue, perhaps for the first time, to what extent and how far the amendment to statute U.S. Code, tit. 28, sec. 391, passed in 1919 (St. February 26, 1919, c. 48), has done away with such technicalities as are here raised on the basis of old precedents. This statute and the spirit of the latest decisions of this Court, we submit, leave our Federal Courts not only free to disregard such trivialities, but compel them to overlook technicalities which in the past stubbed the judicial toe over the dotting of an "i" or the crossing of a "t". The order of the day now is that parties shall not be deprived of a chance to have rights finally adjudicated on their merits in a court of justice because a judge adopts as his signature an informal rather than a formal form.

The question here presented is whether the later decisions of this Court, interpreting the statutes and rules of Federal procedure, have not introduced this new and more liberal viewpoint and superseded earlier decisions of this Court.

Our brief will show that the trial judge and the clerk of Court followed a long-established practice of this District Court and Circuit Court of Appeals for the First Circuit in treating as sufficiently allowed for appellate purposes a bill of exceptions signed by the trial judge with his initials. Over a long period of time bills of exceptions signed by the trial judge with initials only had been accepted as the record on review and appeal to the Circuit Court of the United States for the First Circuit. Prior to this decision that practice in the District Court and the Circuit Court of Appeals had in no way been criticized. Without comment this practice was considered by the judges, clerks and bar in said

District Court and in said Circuit Court of Appeals as proper practice. We invite attention to the certificate of the clerk of the District Court submitted herewith (a copy appears on page 8 hereof) and to the request of the District Judge Lowell (R. 312).*

On March 22, 1932, the Court of Appeals, without consideration of the merits, rendered its judgments affirming the judgments of the District Court based solely on this technical defect (R. 269, 270).

The Court failed to consider the bearing on the error in question of the statute of "Harmless Error" (U.S. Code, tit. 28, art. 391), or of the statute of "Amendments" (U.S. Code, tit. 28, art. 777), and the rule announced and the course followed by this Court in the same and like situations in *Michigan Ins. Bank* v. *Eldred*, 143 U.S. 293, and *United States* (*Ex Rel. Kinney*) v. *U.S. Fidelity Co.*, 222 U.S. 283. (This we discuss in our brief, pp. 18-28.)

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*This point would probably not have arisen if respondent's counsel, after having assented to the bills of exceptions, shortly before oral argument in its brief for the first time had not questioned the sufficiency of Judge Lowell's signatures to these bills. Neither then nor later did they file or present any formal motion to that issue.

The claimed defect coming to your petitioner's actual knowledge for the first time just before argument in the Circuit Court of Appeals, your petitioner sought and believed it had in the limited time available found an answer to that issue under the statutes and authorities which it cited in a supplemental brief filed at the opening of its oral argument. Your petitioner first brought the question to the actual attention of the Circuit Court at the opening of its oral argument, defined the issue, stated that counsel thought his supplemental brief cited authorities enabling the Circuit Court to dispose of the issue in these cases, but asked that if the question became of moment he might further be heard and take such proceedings as might lie to cure any error.

The presiding judge, to counsel's statement that the issue turned on the fact that Judge Lowell had signed the bills of exceptions with his initials only, asked, in substance, "What difference does that make?" to which counsel replied, in substance:

> "There is an old case in 125 U. S. where the Supreme Court said it did make a difference and while I feel my supplemental brief points out authorities which in this case enables this Court to deal with these bills on their merits I would like in case the Court does not agree with my ideas permission to be heard and to file such proceedings as may be necessary to cure the error."

The presiding judge replied in substance:

> "All right, proceed."

Oral argument was thereafter confined to the merits, and none to defective authentication (R. 273, 307).

In that supplemental brief your petitioner called to the Court's attention the facts that each of the bills was assented to and actually allowed and

Instead it erroneously ruled that the amendment necessary to cure the imperfect authentication was one of substance, which could not be had after the term at which the judgments were entered had expired. On that ruling, and not as a matter of discretion, it denied opportunity for the necessary amendment and affirmed the District Court's judgments.

A petition for rehearing was filed on April 20, 1932, and, without opportunity for argument and without opinion, denied on May 6, 1932 (R. 313).

The opinion of the Circuit Court herein presented for review is reported in 57 F. (2d) 44.

This petition is presented under the provisions of the U.S. Code, tit. 28, sec. 347.

The reasons relied on by your petitioner for issuance of said writs, and upon which your petitioner believes the writs ought to be issued, are as follows:

1. There is involved here the important issue of whether the Federal practice shall go forward under a proper interpretation of recent Federal statutes and decisions to free itself from still persisting clogs of technicalities which prevent decisions on the merits because of trivialities which hang on ancient precedents.

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cited, among other authorities, the statute pertaining to record on appeal (U.S. Code, tit. 28, sec. 865), the statute of amendments (U.S. Code, tit. 28, sec. 777), the practice of this Court as to amendments defined in *Idaho & Oregon Land Co.* v. *Bradbury*, 132 U.S. 509, 513, and in *Norton* v. *Larney*, 266 U.S. 511, 516, and as followed by said Circuit Court of Appeals in *Koch* v. *Sidney Blumenthal & Co.*, 3 F. (2d) 395. Attention there was called to the policy of Federal Courts in like matters illustrated in *State of Kansas* v. *Meriwether*, 171 F. 39 (C.C.A. 8), *Nashua & Lowell R. Co.* v. *Boston & Lowell R. Co.*, 61 F. 237 (C.C.A. 1), *Cunningham* v. *German Insurance Co.*, 103 F. 932 (C.C.A. 6), *Railroad Co.* v. *Schutte*, 100 U.S. 644, and *Bedford* v. *Henry Miller, Inc.*, 212 F. 368 (C.C.A. 4). Attention was also called to the power of amendment illustrated in *Wight, Petitioner*, 134 U.S. 136, 143, and *Gagnon* v. *United States*, 193 U.S. 451, 456, and to the duty of a trial judge to sign a proper bill of exceptions, even after judgment term, illustrated in *Re Federal Life Ins. Co.*, 248 F. 908 (C.C.A. 7), and *Schmidt* v. *Standard Steel Car Co.*, 202 F. 1023 (C.C.A. 2). On these facts, these and other like authorities (and not merely on the fact of an assented to bill of exceptions as the Circuit Court in its opinion erroneously states, R. 268) your petitioner before the Circuit Court took the position that that Court should treat the error as harmless and give these bills their intended legal effect by treating them as though the imperfect authentication had been perfected.

2. The decision introduced uncertainty in Federal practice in that it is in conflict with a long-standing decision from a Circuit Court of Appeals of equal rank.

3. There is also involved the application and interpretation of the liberalizing recent Federal statutes which were meant to do away with miscarriages of justice, so that cases may not be disposed of for technical defects in practice or want of form alone.

4. The decision of this Court on matters herein involved is necessary that the interpretation of the statutes and the rules of Federal practice may be kept uniform throughout the various circuits.

5. An important Federal statute has been disregarded or misinterpreted by the Circuit Court of Appeals for the First Circuit, which raises a question of general application in Federal practice and procedure and which has not been, but should be, settled by this Court.

6. Said Circuit Court of Appeals has decided a question of Federal law of general application so as to be in conflict with applicable decisions of this Court and procedure in Federal practice.

7. Said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Wherefore your petitioner prays that in each said case a writ of certiorari herein issue.

GEORGE A. OHL & COMPANY,
By LEE M. FRIEDMAN,
LOUIS B. KING,
Its Counsel.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. BOSTON, July 5, 1932.

Louis B. King, first being duly sworn, deposes and says: That he is of counsel for the petitioner, George A. Ohl & Company; that he has read the foregoing annexed petition, and knows well the contents thereof; that he also carefully had read and studied the transcript of the record which accompanies said petition, being the transcript of the record of the case at bar; that the matters in said petition contained are, in the judgment of each affiant, duly supported in and by said transcript of record and the certificate of the clerk of the District Court of the United States for the District of Massachusetts, submitted with said petition; and that he knows of the above proceedings had, and that the acts and facts in said petition stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me the day and year first above written.

CARLTON SPENCER,
Notary Public.

We do hereby each certify that we each carefully have examined the foregoing petition for writs of certiorari; that the allegations thereof are true, as we each verily believe, and in the opinion of each of us the petition is well founded and each of the cases is one in which the prayers of the petition should be granted by this Court.

LEE M. FRIEDMAN,
LOUIS B. KING,
Counsel for Petitioner.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MASSACHUSETTS

Law No. 3210

GEORGE A. OHL & COMPANY
Plaintiff

v.

A. L. SMITH IRON WORKS
Defendant

Law No. 3267

A. L. SMITH IRON WORKS
Plaintiff

v.

GEORGE A. OHL & COMPANY
Defendant

CERTIFICATE OF JAMES S. ALLEN, CLERK

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, and the custodian of its files and of the files and records of the former Circuit Court for the District of Massachusetts, do hereby certify that:—

1. I have been Clerk of this District Court since July 2, 1917. The deputy clerks of this court have been employed in this office for varying lengths of time, one of them having commenced his service in this court in 1888; another in the Circuit Court in 1894; another in 1898, and another in 1907. Prior to making this certificate, I have inquired as to the matters herein stated of each of the deputy clerks who have

had familiarity with appellate records in this court or the old circuit court, including the four above referred to, and this certificate is based upon the memory and recollection of each of these deputy clerks, as well as my own.

2. For many years, bills of exceptions in this district have frequently been signed by trial judges with initials only, and bills thus signed have been, so far as we know, universally regarded both by the judges, the clerks and deputy clerks, and the bar generally, as sufficiently allowed and signed for appellate purposes. Very many bills of exceptions thus signed by the trial judge with initials only have formed a part of the record for appellate review and have constituted a part of the record entered in the United States Circuit Court of Appeals for the First Circuit. Prior to the hearing and decision by said Circuit Court of Appeals of the above entitled cases, this practice has never been commented upon, criticised or condemned by the judges of this court or of said Circuit Court of Appeals, so far as my deputies and I can recall; and so far as we can recall, until the above entitled cases were decided, every case in which the bill of exceptions was signed by initials only has been treated and disposed of by the said Circuit Court of Appeals as though the bill of exceptions was sufficiently signed and authenticated.

3. In each of the following cases appealed from this court to the Circuit Court of Appeals, the bill of exceptions was signed by the judge with his initials only, and was disposed of on its merits and without criticism of said signature by said Court of Appeals. I have made no effort to locate all such cases, the few mentioned being cited merely as an illustration of the custom and without attempting to show how frequently or during how long a period the custom has existed:—

Law 1794 National Shawmut Bank v. Boston 1925
7 F. (2) 1020 (case 6)

Crim	5609	Capuano v. United States 9 F. (2) 41	1925
Law	484	Wing v. McCallum, 16 F. (2) 645; 30 F. (2) 505; 31 F. (2) 940.	1927
"	4087	Mitchell Woodbury Corp. v. Albert Pick Barth Co. Inc. et al. et Tr. 41 F. (2) 148.	1929
"	3926	Harry Ford v. United States 44 F. (2) 754	1930
"	2700	Robert M. Leach, Ex'r. v. Malcolm E. Nichols, Collector 42 F. (2) 918; 50 F. (2) 787	1930
"	3762	Agnes T. Carville, Admx. v. N.Y.C. RR. 53 F. (2) 153	1931
"	3763	Emma E. Staples, Admx. v. N. Y. C. RR. 53 F. (2) 153	1931
"	3498	Nonantum Investment Co. v. Maryland Casualty Co. 56 F. (2) 329	1931
"	4273	Gertrude L. Holmes v. The Ginter Restaurant Co. 54 F. (2) 876	1931
"	4216	Evelyn Ellsmore v. Erlanger Tremont Theatre Corporation 56 F. (2) 809	1931
"	4230	John Farr, Jr. et al. v. N. E. Trust Company 57 F. (2) 103	1931
Crim	9544	United States v. Edward Cohen 56 F. (2) 28	1931

This certificate is made at the request of counsel for George A. Ohl & Co. respectively plaintiff and defendant in the above entitled cases.

In Testimony Whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District this 2nd day of June, A. D. 1932.

JAMES S. ALLEN

James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts

[Seal of Court]

Original of above submitted with original petition.

Supreme Court of the United States.

OCTOBER TERM, 1932.

No.

GEORGE A. OHL & COMPANY, PETITIONER,

v.

A. L. SMITH IRON WORKS, RESPONDENT.

No.

SAME *v.* SAME.

Brief in Support of Petition for Writs of Certiorari.

A.

STATEMENT OF CASE, QUESTIONS RAISED AND ERRORS ASSIGNED.

The trial judge wrote at the end of an assented to and meritorious bill of exceptions: "Allowed, August 20, 1930.

J. A. L.
D. J."

(R. 219, 221, 236, 237.)

He followed a long-established practice at least tacitly approved and not before criticized by the Circuit Court of Appeals for the First Circuit. That practice was first challenged by this respondent just before argument, practically nine months after appeals in these cases had been entered (Petition, p. 4). Because of the form of the signature of the district judge on the bill of exceptions the Circuit Court of Appeals, not as a matter of discretion, but because of its ideas of the limitations of its power, refused to consider the merits of the appeal, refused to treat the defect as amended, refused opportunity for amendment and affirmed the District Court judgments (R. 269).

57 F. (2d) 44.

The resultant facts and errors are:

1. This decision is in conflict with another Circuit Court of Appeals decision which had established the practice of the Federal Courts years ago.

2. Two important Federal statutes regulating practice are misinterpreted.

(*a*) The trial judge's personal mistake was "harmless error" within U.S. Code, tit. 28, sec. 391.

(*b*) The mistake was amendable within U.S. Code, tit. 28, sec. 777.

The Circuit Court of Appeals not only erroneously interpreted, but misapplied, these statutes.

3. The rule of "judgment term," limiting action after the expiration of the judgment term, was erroneously applied by the Court in deciding that the application of this rule precluded a curing of an error such as here existed.

4. That the case was pending in the Circuit Court of Appeals when the question was first raised does not prevent amendment. That the Court was in error in deciding the contrary.

5. So far as the Circuit Court of Appeals had discretionary power, on the facts of these cases, where the signature of the trial judge was in accordance with recognized custom and where the established practice of the circuit showed a long-continued condonation of that custom, the Circuit Court of Appeals did not use a sound judicial discretion in inflicting on the appellant so severe a penalty for a fault for which it was in no wise blameworthy.

Compare *Barber Asphalt Co.* v. *Standard Co.*, 275 U.S. 372, 386-387.

B.

THERE WAS MERIT IN THE BILLS OF EXCEPTIONS WARRANTING JUDICIAL REVIEW.

We assume that if there was plainly no merit in our bills of exceptions, relief would not be granted us. We therefore

outline some of the substantial issues involved in the trial, without arguing them to show that the questions raised merited consideration in the Court of Appeals.

1. The contract in issue was formal, complete, written, signed and sealed (R. 11-14). Yet the trial Court refused so to construe it (R. 250, Assignment 33).

2. The trial Court violated the parol-evidence rule in admitting evidence of negotiations prior to the making of the contract upon which was based a claim of implied warranty inconsistent with the express warranty (R. 238, Assignment 1). The trial Court refused to construe the contract on material issues, and left its construction largely for the jury (R. 241, Assignment 2; R. 251, Assignment 34; R. 252, Assignment 35; R. 253, Assignment 36).

3. The trial Court ruled that there was an implied warranty "that the machine would do perfect work" (R. 214, 253, Assignment 36).

4. The defects claimed by the buyer were actually observed on April 15, 1926 (R. 8, 9, 10). The first notice claimed was on June 25, 1926 (R. 9, Specification 9; R. 30, Exhibit CC), which the trial Court ruled to be in error (R. 83, 84), describing a defect that did not exist (R. 75, 80, 82). The next notice claimed was August 13th (R. 9, Specification 9-B; R. 32, Exhibit EE)—120 days after the claimed defects had been observed in actual operation (R. 8, Specifications). Yet the trial Court ruled as a matter of law that notice was given seasonably under the Sales Act (R. 255, Assignment 41; R. 257, Assignment 42).

5. The trial Court refused to require the buyer to elect between its inconsistent remedies, recoupment defense or breach of warranty action in accordance with the Sales Act of Massachusetts, General Laws, c. 106, sec. 58 (1 *a*, *b* (2)). *Mark* v. *Stuart Howland Co.*, 226 Mass. 35 and 43 (R. 249, Assignments 26, 27).

6. The machine was delivered March 15, 1926 (R. 8, Specification 1; R. 62). By the respondent in an experi-

ment it was broken October 15, 1926 (R. 94), after being in use six months (R. 8, Specification 2). The jury was charged on May 7, 1929 (R. 5). Yet on damages the Court instructed the jury to find the value of the machine, once "before it broke" and again "in its present condition" (R. 216; R. 258, Assignment 48).

7. In a trial which took three weeks (R. 4) the judge charged the jury in this very technical and complicated case for not over ten minutes (R. 213-217, Assignments 50, 51, 52; R. 218, Exceptions R, S, T).

8. Under the charge and verdicts the respondent was permitted to keep the merchandise (R. 215, line 28), to get back the $4963 it paid for it (R. 32, Exhibit EE; R. 215, 216), the $2531.75 it spent for repairs (R. 110, 216), a total of $7494.75, included in its $7500 verdict (R. 234), and is excused from paying the $6504 note balance owed for it (R. 5). On this charge and these verdicts the respondent keeps the machine, the motor and dies, about the last two of which there never was any issue raised (R. 215), for all of which it pays nothing at all.

We invite a reading of the original brief to the merits filed for the petitioner, a copy of which accompanies the petition herein.

C.

ARGUMENT.

I.

The Present Decision is in Conflict with the Practice Established by Another Federal Circuit Court of Appeals, and Introduces Uncertainty into Federal Procedure and Practice.

It is, of course, difficult to get reported cases from Circuit Courts of Appeals dealing with a situation such as ours as, we believe, most of such cases were so liberally dealt with as to be handled without opinions on such issues. Reported decisions where this issue has arisen are almost nil. The

one Circuit Court of Appeals which has dealt with the same principle and in an identical situation is the Eighth Circuit. The case arose in 1924:

"The first ground of the motion to dismiss rests upon this condition of the bill of exceptions. At the end of the recital of the proceedings at the trial appears the usual form of an approval of the bill of exceptions with the dates blank and the place for the signature of the judge blank, just over the words:

" 'Judge District Court of U. S. Southwestern Division, Western District of Missouri.'

"Also below this appear the words:

" 'The above and foregoing bill of exceptions is hereby approved, Griffin & Orr, Attorneys for Defendant William J. Burns International Detective Agency, Inc. McReynolds and McReynolds and John Flanigan, Attorneys for First National Bank of Sarcoxie, Missouri.

" 'Let the bill be filed and the filing show of record as of this 25th day of February, 1922.

ARBA S. VAN VALKENBURGH, Judge.'

"This condition of the bill of exceptions convinces that counsel for the plaintiff prepared it, and submitted it to the counsel for the defendants; that thereafter counsel for the plaintiff either presented it or caused it to be presented to the trial judge; that he intended to allow and certify it in the usual form, but by mistake wrote his name in the last blank for his signature, instead of in the blank at the foot of the usual certificate. He would not have ordered the bill of exceptions filed, if his mind had not assented to its approval, and as counsel for the defendants stipulated that the bill of exceptions was correct, the mistake of the judge in the placing of

his signature ought not to deprive the plaintiff of the benefit of her writ of error. U. S. Compiled Statutes, §1591. The motion to dismiss the writ of error is therefore denied."

Steen v. *First National Bank*, 298 Fed. 36, 37, 38 (C.C.A. 8).

This case has stood unchallenged as a precedent for the intervening eight years until the decision of our Court. Our case and this cannot be distinguished on principle. We therefore ask this Court to speak authoritatively as to which of these equally ranking decisions is to be the law.

II.

Liberalized Federal Practice Does Away with Such Technicalities of Procedure as were here Applied.

From the very beginning in 1789 there has been a constantly growing, distinct and vocal public sentiment that the administration of justice in our Courts should be brought up to date and the law freed from slavish adherence to precedents which from one cause or another had grown into hard and fast rules of procedure as the law made its slow progress from mediaeval lawyers' refinements to become a working machine for administering practical justice.

In response to this popular demand Congress in 1915 passed an act doing away with some still persisting artificialities of Federal pleadings and procedure. This act freely allowed at any stage amendments of pleadings and a change of form of action from equity to law or from law to equity (U.S. Code, tit. 28, sec. 397); and provided for the interposition of equitable defenses and the granting of equitable relief in actions at law; gave the Appellate Courts full power to render such judgment upon the record as law and justice required without too nice a regard to technicalities (U.S. Code, tit. 28, sec. 398); also permitted to be shown

at any stage in the litigation that Federal jurisdiction based on diversity of citizenship existed (U.S. Code, tit. 28, sec. 399).

Act March 3, 1915, c. 90.

In 1919, as another step of progress, Congress passed an additional act further unfettering Federal Appellate Courts by giving them power to render decisions based on the substantial rights asserted by litigants even though there were procedural defects in presenting them. There was then added to the Judicial Code the provision:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."
>
> St. February 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391.

This as well as all these Federal statutes of similar nature previously enacted were—

> "designed to free the administration of justice in the Federal courts from all subtle, artificial and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits."
>
> *McDonald* v. *Nebraska*, 101 Fed. 171, 176 (C.C.A. 8).

The "defects" and "technical errors" which the last statute eliminates have to do with shortcomings in the technique of the judicial procedure which a litigant must use to assert his substantial rights. The shortcoming here in the form of the judge's signature authenticating an agreed upon

bill of exceptions concerns only the method of asserting our rights. Where this Court in modern practice has enforced with any strictness rules relating to bills of exceptions, it has done so for "substantial" and not "technical" errors.

> "Strict requirements are thus insisted on so as to make certain that the reviewing court shall have before it an accurate account of the evidence or exhibits, which were before the trial court in the original hearing of the issues of the case, properly certified."
>
> *Krauss Brothers Lumber Co.* v. *Mellon*, 276 U.S. 386, 390.

The case at bar presents no uncertainty as to the record, for the Appellate Court can completely ignore the defective signature and rely on other recitals of the record certified under seal by the clerk of the District Court (R. 226, 263) which show:

> "On the 20th day of August A. D. 1930, the substitute bill of exceptions, motion to amend substitute bill of exceptions and the bill of exceptions concerning the plaintiff's motion for a new trial are allowed" (R. 6).

Record, 7, shows entered on the bill of exceptions:

> "Filed August 8, 1930; amended and allowed August 20, 1930."

To a like effect see R. 221, 236, 237.

This same problem was present in one of our recent Massachusetts cases where a Superior Court judge endorsed with initials only a denial of a motion to vacate judgment. The Appellate Court felt constrained to hold that the initials must be disregarded as a judge's signature, but the official attestation of the clerk of the lower Court to the effect that the motion to vacate judgment had been denied appear-

ing in the record the Appellate Court took official cognizance of the record as a whole.

Fairbanks v. *Beard*, 247 Mass. 8, 9.

It is respectfully submitted that our case shows no "total failure to observe an important regulation in matter of substance" as in *Barber Asphalt Co.* v. *Standard Co.*, 275 U.S. 372, 384.

Under this statute what is incumbent upon an Appellate Court is that the Court be—

> "required, however, by the Act of February 26, 1919 (U. S. C. A. §391) on hearing of an appeal, to give judgment 'after an examination of the entire record before the court, without regard to technical errors, defects or exceptions, which do not affect the substantial rights of the parties' . . . courts exist to do justice; and it would be a reproach to any legal system to deny a litigant relief, to which upon his pleadings and proof he is entitled, merely because his counsel have come in by the wrong door of the court."
>
> *Clarksburg Trust Co.* v. *Commercial Casualty Ins. Co.*, 40 F. (2d) 626, 634 (C.C.A. 4).

The case at bar presents an instance of where there was an almost complete compliance with all requirements, imperfect only in that the judge signed his name informally. The mistake was not that of a litigant, but solely that of the judge. It was at worst a mere irregularity of form. There is no question but that it was the judge's signature. The fact that he did not write his name in full was an error of the most harmless kind, in no way doing any injustice to the respondent. If ever an error can be "harmless," is not this an extreme instance? If ever a defect is "technical," is not this the most technical of such defects?

III.

The Mistake was Amendable.

The amendment asked was only to perfect a partial or imperfect authentication of the bill. It sought only to give effect to the trial judge's act allowing the bill. It neither amends nor disturbs the judgments themselves, nor imports or detracts any substantive item not already in the case.

> "DEFECTS OF FORM; AMENDMENTS.—No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, *in any court* of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."
>
> U.S. Code, tit. 28, sec. 777.

From the beginning this Court announced, and all Federal Courts consistently have followed, that the intended purpose of the statute is remedial, entitled to a most liberal construction and intended to avoid miscarriage of justice through technical faults of form.

> "The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20 (now section 954, Rev. St. U. S.) and quite as broadly, to say the least, as it is possessed by any other courts in

England or America, and it is upheld upon principles of the soundest protective policy."

Matheson's Adm'rs v. *Grant's Adm'r,* 2 How. 263, 281 (per Story, J.).
Norton v. *Larney,* 266 U.S. 511, 516.
Taylor Co. v. *Anderson,* 275 U.S. 431, 438.

"The discretion of the court to allow amendments is so clearly conferred by section 954 of the Revised Statutes (U. S. Comp. St. 1901, p. 696) that it is unecessary to cite any of the numerous cases on the subject. When a party gets his cause of action, or his defense, or his appeal, before a court of competent jurisdiction, he should not be turned out before trial of the merits of the controversy, except in obedience to a clear statutory mandate, or on a showing of gross carelessness or bad faith. The absolute dismissal of a plea or an appeal, for error in a matter of mere procedure, is in reality the infliction of the severest penalty for a minor fault, and is suggestive of the excessive punishments formerly inflicted for minor offenses in the administration of the criminal law. Conformity to rules of procedure is important, but usually it may be secured by imposing as a condition of amendment the payment of costs or other penalty, short of dismissal, on the party or his counsel, as circumstances may require, for negligence or inadvertence."

Bedford v. *J. Henry Miller, Inc.,* 212 Fed. 368, 370 (C.C.A. 4).

"Under section 954 of the Revised Statutes the right of amendment extends to the 'summons, writ, declaration, return, judgment, and other proceedings in civil causes in any court of the United States,' and may be exercised at any stage of the case, even after trial and judgment. The extended and beneficent use made of the

> authority given by this section to make amendments is disclosed by a long line of decisions of the supreme court of the United States covering every step in a case from the summons to the verdict and judgment."
>
> *McDonald* v. *Nebraska,* 101 Fed. 171, at 177 (C.C.A. 8).

Under this statute the power of an Appellate Court "in its discretion to allow such amendments—and its duty to do so in appropriate cases, cannot be doubted."

Norton v. *Larney,* 266 U.S. 511, 516.

Allowance of a bill of exceptions is the main element. Signature is the form by which that allowance is evidenced. It is like a writ, issuing from Court, lacking a seal of the Court, or a signature, or wanting some other such element. In such instances Federal Courts have repeatedly declared such defects in writs, as lack of a seal, lack of a return day, or lack of the proper signature, lack of the proper test, or the like mere matters of form, capable of amendment.

United States v. *Turner,* 50 Fed. 734.
Cotter v. *Alabama, G. & S. R. Co.,* 61 Fed. 747.
Bryan v. *Ker,* 222 U.S. 107, 112.
Miller v. *Texas,* 153 U.S. 535.
Texas & Pacific Ry. Co. v. *Kirk,* 111 U.S. 486, 487.

Moreover the bill, with its authentication, whether complete or imperfect, is a record of the trial Court (*Pomeroy's Lessee* v. *Bank of Indiana,* 1 Wall. 592, 599), and as such the authentication at least is capable of amendment by that Court. While a record cannot lawfully be amended after the term unless there is official evidence on which to base an amendment, and something to amend, where those two elements exist the amendment may be had *nunc pro tunc.* This Court has said that even where there is no evidence of official

action beyond the judge's recollection of the facts, any entry justified by such recollection may be made *nunc pro tunc.*

In re Wight, 134 U.S. 136.
Michigan Ins. Bank v. *Eldred,* 143 U.S. 293, 299.
In re Plymouth Cordage Co., 135 Fed. 1000, 1003 (C.C.A. 8).
Brown v. *United States,* 196 Fed. 351, 353 (C.C.A. 7).

It is a puzzle to us just why our Court chose to pick out *Origet* v. *United States* as its precedent. The six cases from this Court which have touched this subject, the other five both preceding and following *Origet* v. *United States,* we submit recognize that a defective authentication may be amended.

The principle which we urge—that defective authentication is amendable—is illustrated in the decisions of this Court, one of which seems to deny and five to recognize it.

1. *Mussina* v. *Cavazos,* 6 Wall. 355, at 363 (1867):

> "Whatever might be our opinion of the exceptions which appear in the record, if they were presented in such a way that we could consider them, we find them beyond our reach. The bill of exceptions, or what purports to be a bill of exceptions, covering more than three hundred and fifty pages of the printed record, is neither signed or sealed by the judge who tried the case; and there is nothing which shows that it was submitted to him or in any way received his sanction."

The underlined clause was unnecessary to the decision unless the Court considered the defect amendable had there been anything "which shows that it was submitted to him (the trial judge) or in any way received his sanction."

2. *Blitz* v. *Brown,* 7 Wall. 693, at 694 (1868):

The clerk's certificate to the transcript of record submitted on writ of error was a blank form without seal of court or signature of clerk. Held, there was no authentication whatever, so the Court was without jurisdiction and the writ was dismissed.

3. *Origet* v. *United States,* 125 U.S. 240, 243, 244 (1888):

The bill of exceptions was signed "A. B." The Court held the initials "A. B." not the signature of the judge, not a sufficient authentication, nor sufficient evidence of its allowance by the judge of the Court and refused to consider its contents. There was nothing to show who "A. B." was, or anything to indicate that if properly authenticated the bill of exceptions merited a review, or that any effort had earlier been made to have the mistake corrected. The implication is that the right of amendment was denied.

4. *Idaho & Oregon Land Co.* v. *Bradbury,* 132 U.S. 512, 513 (1889):

This was a case of defective authentication of the transcript of the record. The certificate of the clerk was complete except for signature, which was omitted. Although recognizing the authority of *Blitz* v. *Brown,* the Court here held:

> "The question presented is not one of no authentication, but of irregular or imperfect authentication; not of jurisdiction but of practice. It is, therefore, within the discretion of this court to allow the defect to be supplied. Considering that the motion to dismiss was not made until it was too late to take a new appeal or writ of error, justice requires that the record should be permitted to be withdrawn for the purpose of having the certificate of authentication perfected by adding the signature of the clerk."

This decision overrules the implication in the Origet case.

5. In *Michigan Insurance Bank* v. *Eldred*, 143 U.S. 293, 298, 299, this Court considered specifically the question of amending bills of exception, seasonably filed, after the judgment term, and held:

> "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end. . . .
>
> "The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court; the trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed. Hanna v. Mass. 122 U. S. 24. Any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, cannot be amended at a subsequent term, as a misprision of the clerk in recording inaccurately or omitting to record an order of the court might be. In re Wight, 134 U. S. 136."

The entire second paragraph, and especially the last sentence, was unnecessary unless the Court recognized the possibility of amendment after the judgment terms *for "fault or omission of the court."*

6. This Court last dealt with imperfect authentication of a bill of exceptions in *United States (Ex Rel. Kinney)* v. *U.S. Fidelity & Guaranty Co.*, 222 U.S. 283, 284:

> "As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record contains no bill of exceptions. The paper in the record styled 'Exceptions to the charge to jury,' initialed 'J. B. McP., trial judge,' and signed by the plaintiff, is not a bill of exceptions (Origet v. United States, 125 U. S. 240, 243), but if it were to be treated as a bill of exceptions as all the matters therein referred to depend for their solution upon an examination of the evidence which is not in the record, it follows that we have no means of determining whether reversible error arose from an action of the court on any of the subjects to which the paper refers. This being the case, it becomes our duty to affirm."

This clause underlined was unnecessary unless the power of amendment existed to be exercised in a meritorious case even after judgment term.

IV.

"Judgment Term."

Our Circuit Court of Appeals decided that it was too late to send the case back for amendment, as the term at which the judgments had been entered had expired and the District Court had lost jurisdiction (R. 269). We do not question that the general rule is:

> "That the bills of exceptions shall be signed before the trial court loses jurisdiction of the cause by expira-

tion of the term or such time thereafter as may have been duly prescribed."

Exporters v. *Butterworth-Judson Co.*, 258 U.S. 365, 369.
Walton v. *United States*, 9 Wheat. 651, 657-658.

". . . This rule is not without exceptions that there may be circumstances justifying the signing of the bill after the expiration of the term at which trial was had. The rule is not an iron clad rule. It is a rule for the protection of the rights of parties, but is not to be applied with vigor to defeat the ends of justice where the party seeking relief is without fault. . . . But there may be circumstances not resulting from laches of the parties which should avail to relax the rule."

Western Dredging & Imp. Co. v. *Heldmaier*, 116 Fed. 179, 182 (C.C.A. 7).

Not only where the circumstances of a particular case have justified it has a bill of exceptions been allowed by a trial judge after the expiration of the judgment term, but even required by mandamus.

Such exceptions have been recognized by this Court.

Under "very extraordinary circumstances":

Muller v. *Ehlers*, 91 U.S. 249, at 251.
Jones v. *Grover & Baker Sewing Machine Co.*, 131 U.S. Appx. cl.
Michigan Insurance Bank v. *Eldred*, 143 U.S. 293, 298.

Where justice requires a suspension of the rule:

United States v. *Breitling*, 20 How. 252, 254.
Dredge v. *Forsyth*, 2 Black, 563, 568.

Under "special circumstances":

Hume v. *Bowie*, 148 U.S. 245, 253.

Where delay is caused by the judge and assent is given within the term:

Davis v. *Patrick*, 122 U.S. 138, 143.
Waldron v. *Waldron*, 156 U.S. 361, 378.

Where the opponent is estopped from objecting to a late signature:

Chateaugay Ore & Iron Co., Petitioner, 128 U.S. 544, 555.

Where delay is through fault of opponent:

Hunnicutt v. *Peyton*, 102 U.S. 333, 355.

For "sufficient reason":

Hunnicutt v. *Peyton, supra.*

Where the judge is away, consent seasonably given:

Taylor v. *United States*, 52 Sup. Ct. Rep. 466.

Where the fault is the court's:

Michigan Insurance Bank v. *Eldred, supra*, at 299.

In our Circuit Courts of Appeals the following have been held sufficient within the recognized exceptions:

Inability of Court stenographer to transcribe notes on exceptions:

Dalton v. *Gunnison*, 165 Fed. 873 (C.C.A. 9).

Trial judge ill:

Roberts v. *Bennett*, 135 Fed. 748 (C.C.A. 2).
Re Bills of Exceptions, 37 F. (2d) 849, 851 (8) (C.C.A. 6).

Exhibits mislaid without fault of excepting party:

Pittsburgh Gas & Coke Co. v. *Goff-Kirby Coal Co.*, 151 Fed. 466 (C.C.A. 3).

Presented in time, but delay in settling:

Southwest Metals Co. v. *Gomez*, 4 F. (2d) 215, 218 (C.C.A. 9).

Refusal of judge to sign in form submitted:

Scaife v. *Western North Carolina Land Co.*, 87 Fed. 308 (C.C.A. 4).

Delay for convenience of trial judge:

Western Dredging & Improvement Co. v. *Heldmaier*, 116 Fed. 179 (C.C.A. 7).

Oral order only of trial judge at time of directing verdict:

Koewing v. *Wilder*, 126 Fed. 472, 474 (C.C.A. 2).

Delay occasioned by adversary or judge:

Franklin County v. *Furry*, 144 Fed. 663, 664 (C.C.A. 7).

Seasonably stipulated for settlement, but delay caused by judge:

Schmid v. *Standard Steel Car Co.*, 202 Fed. 1023 (C.C.A. 2).

Excepting party not guilty of neglect, bill presented in time, judge refused to sign:

Re Federal Life Insurance Co., 248 Fed. 908 (C.C.A. 7).

Where the parties have done all they can:

Re Bills of Exceptions, 37 F. (2d) 849, 851 (9) (C.C.A. 6).

Some of these cases turn on consent of an opponent given during the term. As jurisdiction is never conferred by consent (*Exporters* v. *Butterworth-Judson Co.*, 258 U.S. 365,

369), it follows that the rule and its exceptions are procedural and not jurisdictional, to be enforced to accomplish, and not to defeat, substantial justice.

Each of our bills contains a prayer for allowance. Each is assented to without limitation. The assent continues until all that is necessary is done to give the bills their intended legal effect and brings them within the "consent" exceptions, *supra*. The other facts of our case bring these bills within the principle of the other exceptions to the rule. They actually and seasonably were allowed (R. 219, 222, 236, 237).

If the defect was so amendable within these exceptions to this general rule, then the amendment was one which the District Court was bound to make, and the Circuit Court of Appeals had both the power and duty to treat the bills as amended and act accordingly.

Norton v. *Larney*, 266 U.S. 511, 516.

V.

Appeal Does Not Prevent Relief.

Treating the case as one where "the District Court has lost jurisdiction of the case" (R. 269) by reason of the judgment term expiration and the appeal, the Circuit Court of Appeals held that both it and the District Court were without power now to amend or to correct a "harmless error." The fact of an appeal pending in the Circuit Court of Appeals does not prevent any relief otherwise proper.

Barber Asphalt Co. v. *Standard Asphalt & Rubber Co.*, 275 U.S. 372, 386, 387.

VI.

A Reactionary and Unworthy Decision.

This decision sounds a century late. It belongs to the period of one hundred years ago, when the prisoners were

acquitted because the property stolen was that of Marie Jones and not that of Mary Jones. Decisions like this rankle, and are a blot on the judicial escutcheon. It works an injustice in the case at bar. That is bad enough, but, worse, it establishes a narrow precedent encouraging practitioners to treat the practice of the law as a game to be won by nimble wits manipulating trivialities.

In his request the district judge sets forth that the error in the signature was his, for which counsel for appellant was in no way responsible (R. 312). The course followed was in accordance with the common practice in Massachusetts, condoned by this very Circuit Court of Appeals (Petition, p. 8). If the Court felt these bills were not properly authenticated, it affirmed the judgments "because of the transgression—and this notwithstanding the transgression was largely due to its own course of action." Had it previously in the early days of this practice discountenanced such signatures, the District Court judges and clerks would have changed the practice. Under these circumstances affirming the judgments "was a very severe penalty to impose for action which had the court's implied sanction up to that time." Here the Circuit Court "passed the bounds of a sound ~~transgression~~ in affirming the" judgment "because of the transgression." The fault being the trial judge's personal fault, and not your petitioner's, the Circuit Court "should have remitted the transcript to the District Court to the end that a further opportunity might be had to comply with the" rule.

Barber Asphalt Co. v. *Standard Asphalt & Rubber Co.*, 275 U.S. 372, 386, 387.

But even beyond this, such a technicality is unworthy of modern practice of law. The decision itself was unnecessary and undesirable, not merely because it worked an injustice, but as a step backwards in face of the precedents, and the liberalized decisions of this Court.

It is respectfully submitted that the writs in each case herein prayed should issue to the end that these cases may be disposed of upon their merits and that a proper Federal practice may be established.

Respectfully submitted,
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